ORIGINAL

No. 98-367

Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT D. HANNIGAN, WARDEN, ET AL., PETITIONERS

v.

RAYMOND F. STANSBURY, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached brief in opposition without prepayment of costs and to proceed *in forma pauperis*.

[X] Respondent has peviously been granted leave to proceed *in forma pauperis* in the following court(s):

The Leavenworth County District Court
The Supreme Court of the State of Kansas

[ ] Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Raymond F. Stansbury
(Signature)

43 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Raymond F. Stansbury, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. My employment was terminated in November of 1990; at that time, my gross monthly income was $3,000.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: November 9, 1998.

Raymond F. Stansbury
(Signature)

No. 98-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT D. HANNIGAN, WARDEN, ET AL., PETITIONERS

v.

RAYMOND F. STANSBURY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If the Kansas Legislature has delegated to the DOC the authority to promulgate regulations instead of doing so itself (for the express purpose of implementing its statutes), are the resulting regulations extensions of the statutes, and are they subject to scrutiny under the Ex Post Facto Clause?

2. Can the petitioners legally and constitutionally ignore the directives of controlling administrative regulations that ordered them to compute the respondent's initial parole eligibility date and conditional release date using the regulations in effect on the date of his alleged crime?

3. Can the petitioners legally and constitutionally disregard the directive of an administrative regulations that ordered them not to penalize an inmate for refusing to participate in a program?

4. Is procedural due process violated when the petitioners willfully and wantonly refuse to follow their own administrative regulations?

5. Is it constitutionally permissible to permanently withhold years' worth of the respondent's earned good time credits and confiscate his personal property in response to his refusal to abdicate the statutory and constitutional right to collaterally challenge his conviction?

6. Are the principles of due process and equal protection violated when only certain individuals who have been convicted of an alleged sex-related offense are severely punished by retrospectively rescinding parole eligibility and conditional release for maintaining a trial plea of innocence, for refusing to succumb to the inexorable demands of prison officials for an official admission of guilt, and for seeking habeas relief, while all other types of offenders are free to contest their convictions without being punished and are accorded the full ambit of provisions for reduced imprisonment without submitting a confession?

7. Is a habeas corpus proceeding considered to be a "criminal case" for purposes of the Fifth Amendment privilege against compelled self incrimination?

8. Can the Kansas provisions for conditional release—which, pursuant to K.S.A. 22-3718, is "mandatory" once the maximum term of imprisonment, less good time credits, has been served—be constitutionally conditioned on obtaining a coerced admission of guilt?

9. Is the respondent (who ardently maintains that he is innocent and is currently seeking post conviction relief) under any legal or constitutional obligation to provide the petitioners with a coerced confession that could serve as the basis for lifelong confinement in the state's mental institution once the prison term has been served, and can the petitioners constitutionally revoke conditional release for the respondent's refusal to falsely admit to guilt?

10. Does an accused, even after conviction, have a constitutional right to maintain his innocence, or do the petitioners have the power to coerce (through severe, ongoing punitive measures) changes in the pleas of those who have exercised the right to trial by jury?

11. Can the petitioners constitutionally subject the respondent to only the punitive features of presumptive sentencing provisions enacted two years after his indeterminate sentence was imposed without converting his sentence to flat time?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Ex Post Facto Clauses of the United States Constitution (Art. I, § 9, cl. 3; Art. I, § 10, cl. 1) provide that no state shall pass any ex post facto law.

Section 1 of the 14th Amendment to the United States Constitution states in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Suspension Clause of the United States Constitution (Art. I, § 9, cl. 2) provides that "The privilege of the Writ of Habeas Corpus shall not be suspended. . . ."

Section 8 of the Kansas Constitution Bill of Rights provides that "The right to the writ of habeas corpus shall not be suspended. . . ."

The state statute authorizing an inmate to apply for a writ of habeas corpus, Kansas Statute Annotated (K.S.A.) § 60-1507, provides in relevant part:

> *Motion attacking sentence*. A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence.

K.S.A. § 22-3717, the statute governing parole eligibility, provides in pertinent part:

> (a) [A]n inmate . . . shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.
>
> (n) An inmate shall be eligible for parole on the date provided by statute at the time the inmate committed the crime for which imprisoned unless subsequent amendment of the statute provides an earlier parole eligibility date.

K.S.A. § 22-3718 provides in part that an inmate is entitled to be released from prison once he has "served [his] maximum term or terms, less such work and good behavior credits as have been earned. . . ."

K.S.A. § 22-3725 simply creates a pool of good time credits for reducing the sentencing ranges of indeterminate sentence inmates but does not establish any criteria for determining how credits are earned (only pertinent to parole eligibility) or how many to award; K.A.R. 44-6-124 (set out further below) does both, thereby making it indispensable in the computation of initial parole eligibility and conditional release. Since it implements the statutes that provide for reduced imprisonment, it is a direct extension of them and is easily the most significant set of provisions to this case. Moreover, contrary to what the petitioners have stated in their application for certiorari, K.S.A. § 22-3725 is not the "controlling" statute of the particular version of K.A.R. 44-6-124 that applies to this case: ironically, K.S.A. 75-5251 (which addresses the government and discipline of correctional institutions) and K.S.A. 1983 Supp. 75-5210 (which addresses inmate programs and program agreements) are. In any event, § 22-3725 provides in pertinent part:

> (a) For the purpose of determining an inmate's eligibility for parole or conditional release, regardless of when the inmate was sentenced or committed the crime for which sentenced, good time credits shall be allocated as follows: [A lengthy table follows providing for awards of maximum good time credits in the amounts of one-half of the sentenced imposed for sentences of two years or greater.]
>
> (d) Good time credits shall be awarded on an earned basis pursuant to the rules and regulations adopted by the secretary of corrections.

K.A.R. 44-6-107, conveniently omitted from the petition for certiorari at issue, is a pivotal administrative regulation to the instant case because of the governing effect it exerts over which version of K.A.R. 44-6-124 must be used in computing initial parole eligibility and conditional release. As it appears below, 44-6-107 has been continuously in effect from 1984 to the present time, providing in pertinent part:

(a) The statutes constituting the substantive law in effect at the time the crime is committed shall apply to compute the sentence term and the release dates. No subsequent change in the statute constituting substantive law shall be applied if that law adversely affects the inmate. Changes in statute constituting substantive law which benefit the inmate may be applied to compute the inmate's sentence term and the release dates, but shall not be required to be applied except in the computation of parole eligibility. Parole eligibility shall be computed by applying the statute in effect at the time the inmate committed the crime for which imprisoned unless subsequent changes in the statute provide an earlier parole date. If the amendment would yield an earlier parole eligibility date, that amendment shall be applied. Statutes establishing the formula for computation of parole eligibility shall be considered substantive law and not procedural law.

(b) Any statute or regulation that has been repealed or revoked shall continue to apply to sentences of inmates when other statutes, regulations or the principles of constitutional law require its terms to be applied to that inmate. . . .

(Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210. (Emphasis added.)

K.A.R. 44-6-145 is another critical Article 6 regulation that was left out of the petition before this Court. It too has a definite bearing on which version of 44-6-124 applies to the case sub judice. Reinforcing the nondiscretionary provisions of 44-6-107 set out above, it has been continuously in force from 1984 to the present time, materially providing: "Incentive good time credits which were authorized and applied under previous policies and regulations shall continue to be credited to the inmate's sentence and applied to the record." (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210. (Emphasis added.)

Since parole eligibility and conditional release dates cannot be determined without using K.A.R. 44-6-124, it is implicit to such statutes as K.S.A. 22-3717 and 22-3718 and is an essential part of the "substantive law" providing for reductions in the sentencing ranges of prisoners. Even though the plain and unambiguous terms of K.A.R. 44-6-107 and 44-6-145 ordered the petitioners to compute the respondent's parole eligibility and conditional release dates using the law and associated regulations in effect on the date of his alleged crime, they applied the radically amended September

13, 1993 version of 44-6-124 in order to severely punish him for refusing to relinquish the statutory and constitutional right to seek habeas relief. The particular version of 44-6-124 that must be applied in the case at bar is the May 1, 1984 amendment, since it was in effect on September 9, 1990—the date of the respondent's alleged crime.

Placed side-by-side for ease of comparison, the May 1, 1984 version appears on the left, with the more onerous September 13, 1993 provisions (invalidated by the Kansas Supreme Court) appearing on the right. One point the reader should be aware of is that prior to the publication of the radically amended September 13 version in the Kansas Register on July 29, 1993, the term "withholding" and its variations were nonexistent in the Article 6 regulations governing good time; however, with the term's introduction on the aforementioned date (before then the only way good time credits could be lost was through "forfeiture" by the disciplinary board for having been found guilty of various infractions set out in the inmate rule book, among which program refusal still isn't listed), a second, and far more punitive, method for deferring parole eligibility and conditional release was created.

The relevant portions of each version of 44-6-124 provide:

For parole eligibility, award of good time credits shall be limited as follows:

(1) Inmates with no class I offenses during the review period shall receive at least 50% of good time credits allocated for that period.

(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.

(3) Inmates with no class I, II or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.

(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.

(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior, and on other performance factors related to effective rehabilitation of the inmate.

(b) Award at discretion of unit team and based on merit. The unit team shall refuse to award all or part of that portion of the credits over which they have discretion for poor behavior or work, for malingering in educational programs, or for other relevant reasons determined, explained and documented by the unit team. Inability to work or participate in programs due to legitimate health problems, or for other reasons beyond the inmate's control shall not be considered grounds, standing alone, for refusing to award good time credits. (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.) (Emphasis added.)

(f) The following factors shall be considered in determining whether an inmate has earned good time credits:

(1) the inmate's performance in a work assignment;

(2) the inmate's performance in a program assignment;

(3) the inmate's maintenance of an appropriate personal and group living environment;

(4) the inmate's participation in release planning activities;

(5) the inmate's disciplinary record; and

(6) other factors related to the inmate's general adjustment, performance, behavior, attitude, and overall demonstration of individual responsibility and accountability.

(g) An inmate's disciplinary record shall affect the earning of good time awards in the following manner.

(1) A guilty finding of a class I disciplinary offense shall result in the withholding of a minimum of 50% of the good time credits available for that program classification review period.

(2) A guilty finding of a class II disciplinary offense shall result in the withholding of a minimum of 25% but not more than 50% of the good time credits available for that program classification review period.

(3) A guilty finding of a class III disciplinary offense shall result in the withholding of a minimum of 10% but not more than 25% of the good time credits available for that program classification review period.

(6) A refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail. (Authorized by and implementing K.S.A. 1993 Supp. 22-3725.) (Emphasis added.)

K.A.R. 44-5-105(c)(1) is another material regulation to the instant case: one the petitioners found expedient to leave out of their application for certiorari for obvious reasons. Note that in addition to proscribing punitive measures for inmates who elect not to participate in programs, it is ironically authorized by, and implements, K.S.A. 75-5210—the statute that pertains to inmate programs and program agreements. It has been continuously in effect from 1984 to the present time, providing:

> (c)(1) Any inmate may elect not to participate in a formal program plan. In such an event, that inmate shall not be prohibited from participating in any programs as are available, but the inmate shall first obtain the recommendation and approval of the unit team. The unit team may recommend the inmate for parole eligibility based on the inmate's rehabilitation progress accomplished by the inmate's own initiative. The inmate shall not be penalized for refusal to participate in a formal program plan. The inmate shall nevertheless be subject to all the regulations of the secretary and the orders of the principal administrator, and shall be required to participate in any work assignments which are made by the unit team. (Authorized by K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 1983 Supp. 75-5210, 75-5220, 75-5229.) (Emphasis added.)

K.A.R. 45-4-6(c) was also annexed to the respondent's alleged crime, providing that "Inmates who are appealing their sentence or conviction shall not be adversely affected in the parole process or deliberations. The board may, however, continue the parole hearing for a reasonable time for the purpose of clarifying the status of the appeal to assure that the board is considering the applicant on the proper sentence." (Authorized by and implementing K.S.A. 1984 Supp. 22-3717.) (Emphasis added.)

The 1990 version of 44-6-108 reinforces the fact posited above that prior to the first appearance of the term "withholding" in the radically altered version of 44-6-124 in the Kansas Register on July 29, 1993, all good time credits not "forfeited" were presumed "earned" and applied to the sentence. 44-6-108 provides in relevant part:

> (b) To establish eligibility for parole in certain cases amenable to reduction by good time credits, good time credits, as earned, shall be awarded to reduce the time required to be

served on the minimum term of those sentences as described in these regulations and applicable law.

(c) To establish the conditional release date, good time credits, not forfeited, shall be presumed earned and shall be applied to the maximum sentence term when first computed. (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.) (Emphasis added.)

K.A.R. 44-6-101, a regulation defining various terms used in the Article 6 regulations, defines "[f]orfeiture of good time credits" as "the removal of the credits and consequent reinstatement of a term of actual imprisonment by the disciplinary board pursuant to K.A.R. articles 44-12 and 44-13 as published in the inmate rule book" and "[c]onditional release date" as "the maximum sentence ending date minus total authorized [by the legislature, not the DOC] good time credits not forfeited." Once again, none of the Article 6 regulations annexed to the respondent's alleged crime provided for "withholding" good time credits.

K.A.R. 44-6-113 provides:

In determining parole eligibility . . . good time credits shall not be awarded in advance of earning or on a projected basis. Good time credits shall be awarded only after the inmate has been deemed, by the unit team, to have earned them. However, an auxiliary accounting record, separate from the official inmate record and for informational purposes only, may be used to show the maximum total authorized credits that the inmate may earn. This record may show the parole eligibility date which would occur if all good time credits were earned. (Emphasis added.)

In contrast to 44-6-113 quoted above, the 1990 version of K.A.R. 44-6-142(a) provides in pertinent part that "It shall be presumed, when computing the conditional release, that 100% of the available good time credits is earned and the good time credits shall be applied on a projected basis." (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.) (Emphasis added.)

The 1990 version of K.A.R. 44-6-125 also drew a distinction between the good time credits applied toward parole eligibility versus those credits presumptively awarded at the outset to establish

conditional release, by describing the former in terms of being earned, while the latter as simply those credits "used to create the conditional release date." Moreover, when the more burdensome and punishing version of 44-6-124 was introduced in 1993, "withholding" joined "forfeiture" as a second and far easier method of denying credits (no disciplinary hearing is required), and the unit team joined the disciplinary board or hearing officer as an additional individual vested with the power to deny them. The relevant portions of 44-6-125 provide:

> (b) Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date.
>
> (e) Forfeiture made by disciplinary process. Forfeiture of good time credits may be ordered by the disciplinary board or hearing officer as a penalty for the inmate's commission of certain offenses as set out in K.A.R. 44-12-1 *et seq.* and 44-13-1 *et seq.* (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.)

On January 3, 1995, the DOC radically changed the language of K.A.R. 44-6-142 pertaining to fixing conditional release dates. Prior to that time, standards for awarding good time toward conditional release were not provided in any of the Article 6 regulations because they weren't needed—all available credits were awarded from the outset for purposes of conditional release and could only be lost if forfeited. Instead of providing that 100% of the available good time credits applicable to the conditional release date shall be presumed earned and applied on a projected basis, the regulation now provides in relevant part:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded on an earned basis pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date.

When all of the above regulations are read together, it becomes clear that (1) the Article 6 regulations to be applied to an inmate for the duration of his incarceration were those that were in

effect on the date of his alleged crime; (2) even if they were repealed or revoked, they were to continue being used in calculating reductions to his sentence; (3) prior to January 3, 1995, his conditional release date was initially set based on the presumption that all credits authorized by the legislature had been earned; (4) unlike the credits automatically awarded to establish the conditional release date, those credits for parole eligibility actually had to be earned pursuant to the appropriate version of K.A.R. 44-6-124; (5) he was not to be penalized for choosing not to participate in programs; and (6) all of the Article 6 regulations—via implementation—are intimately related to the statutes providing for reduced imprisonment.

I. STATEMENT OF THE CASE

Due to a questionable rape conviction in case no. 90-CR-2168, the respondent began serving an indeterminate sentence of 10 to 20 years on May 18, 1991, at the age of 39. Prior to the date of his alleged crime, September 9, 1990, he had never been arrested for criminal activity of any kind. He categorically pled "not guilty" at his trial and has ardently maintained his innocence ever since.

Having conducted a detailed psychological evaluation of the respondent and a thorough review of his alleged crime, the State Reception and Diagnostic Center (SRDC) psychologist assigned to his case explicitly told him that he would not be required to participate in the Sexual Abuse Treatment Program (SATP)—a stipulation that is clearly recorded in the KDOC program agreement he was urged to sign. She undoubtedly took the following facts into consideration in making her determination: (1) the prosecutrix admitted that she had engaged in unreported sexual activity with the accused before the date of the alleged rape; (2) she conceded that during a visit immediately preceding the incident in question, he had asked for her permission to bring a condom on his next visit (the day of the alleged rape) for the purpose of having intercourse with her; (3) on the day of the

reputed crime, the accused phoned first to ask if he could come over, and instead of leaving or calling the police, she chose to change into more presentable clothing and wait for his arrival; (4) there were no physical signs of force; (5) she admitted that she was never physically harmed and that no threats were ever made; (6) a thorough medical examination produced no evidence of injury; and (7) a police report disclosed that she had discovered before the filing of her complaint that the accused had asked her younger girlfriend for a date. All of the above points represent uncontested facts recorded in the respondent's trial record.

Well after he had begun to serve his sentence, the respondent's unit team counselor, an individual possessing no more than a high school education and completely untrained in making psychological or diagnostic assessments, arbitrarily decided to override the SRDC psychologist's program recommendations and amended his program agreement to reflect the addition of SATP. Because it would violate his religious beliefs and personal ethics to assume guilt for an alleged crime of which he was actually innocent, and because he was planning on pursuing post conviction relief, the respondent refused to sign the amended agreement. Moreover, in order to complete the DOC's mental health program, he was required to provide a detailed account of his reputed offense in the presence of his instructor and all the other members of his group, which he did with the utmost degree of honesty and sincerity. The facts surrounding his alleged crime were also thoroughly explored at his trial, and there is absolutely nothing he could divulge in SATP that hasn't been fully discussed in the past.

One of the first things demanded of SATP enrollees is an official, written admission of guilt. In fact, the formal admission is an integral part of the agreement inmates must sign in order to be accepted into the program. Inmates who sign the agreement are not provided with a copy, and they are not given a Miranda warning. The program administrator and staff categorically refuse to

consider vehement claims of innocence and questionable evidence or circumstances; they unwaveringly demand that all new participants proffer an admission of guilt, regardless of whether it results in a false statement manufactured under conditions of duress. Inmates are threatened that if they refuse to stipulate to guilt, they will be expelled from the program, all their good time credits will be withheld, and they will be placed on the level system (IMPP 11-101). The admissions of guilt and any other information obtained in the program are not privileged or confidential; they can, and are, used against individuals in subsequent legal proceedings, including those associated with the Sexual Predator Act.

Ironically, SATP has always been touted as a "voluntary program" by prison officials and the implementing staff. On April 18, 1995, Barbara Owens, the SATP coordinator at Lansing Correctional Facility (LCF), stated in writing that the program is voluntary, with no consequences imposed for refusals (see exhibit A). In fact, even Mr. McKune, LCF's warden, stated in an interrogatory pertaining to another suit that SATP participation is voluntary and not required by the KDOC (see exhibit B). However, such claims couldn't be further from the truth, as the following scheme of severe punitive measures for refusal attests:

1. Pursuant to IMPP 11-101, an intransigent inmate who refuses to acquiesce is immediately placed on level one, which results in the confiscation of his television, radio, headphones, and other personal property, all of which were sold to him at a substantial profit by the KDOC. And for those who continue to refuse, their personal property is peremptorily shipped out of the institution and never allowed back into the prison system.
2. Visitation by family members, friends, and relatives is severely restricted.
3. Library use, religious function attendance, and participation in arts and crafts and other activities are either rescinded entirely or severely restricted.

4. The inmate's access to his own money in his institutional account is severely restricted.

5. He is barred from buying books or subscribing to magazines.

6. He is arbitrarily given a higher custody classification and moved to the maximum security area of the prison.

7. His good time credits are permanently withheld at the rate of 100%.

8. Parole eligibility and conditional release are severely retarded or rescinded entirely.

Therefore, given the extreme nature of the consequences for refusal, SATP participation is, de facto, mandatory.

With the advent of presumptive sentencing in Kansas, DOC officials realized that individuals sentenced under the new law would be far more likely to refuse programs because of their fixed release dates. Accordingly, they chose to radically amend K.A.R. 44-6-124 in order to create a deterrent for refusals, since it literally controls the award of good time and is therefore pivotal in determining the ultimate length of time an individual is imprisoned. Even though the amended version was originally intended for presumptive sentence inmates—a contention strongly supported by the fact that it was published in the Kansas Register contiguously with K.A.R. 44-6-146 (identical to the new version of 44-6-124, but addressed to individuals sentenced under flat time) in the same month and year (July of 1993) the new sentencing guidelines became effective—prison officials couldn't resist applying its punitive features to inmates sentenced under the old, indeterminate system. However, its retrospective application to individuals sentenced under the old law makes it far more punishing to them as compared to those sentenced under the new, due to the major differences in the sentencing techniques and the amount of good time credits available to each group. (The respondent respectfully contends that if he is to be expected to bear the punitive features of the new law, he should be converted to flat time so he can experience its benefits as well.)

The provisions of 44-6-124 in effect before the September 13, 1993 amendment made it mandatory for an indeterminate sentence inmate who had not been found guilty of any disciplinary offenses during the 120 day review period to be awarded at least 80% of the good time credits (96 of the 120 available) for each review period he was found to be free of offenses. The award of the remaining 20% of the credits was subject to the discretion of the unit team counselor, based on factors other than disciplinary infractions. Prior to 44-6-124's amendment, there were no provisions in any of the Article 6 regulations that allowed for the withholding of credits for refusal to participate in a program; afterwards, prison officials assumed total discretionary control over all the credits, inmates were no longer automatically awarded good time for avoiding disciplinary violations, and pursuant to subsection (g)(6), program refusal became punishable by withholding the entire range of available credits.

Even though the petitioners were fully aware that the respondent had challenged his conviction in an application for habeas relief on November 19, 1996 (presently under consideration by the Kansas Court of Appeals), they continued to withhold the good time credits he had earned during each 120 day review period for refusing to proffer an official admission of guilt pursuant to the terms of SATP. By the time the state courts ruled auspiciously in the instant matter, the petitioners' refusal to abide by the directives of their own administrative regulations had resulted in the loss of 1,120 days' worth of the respondent's earned good time credits, a wrongful deferment of his initial eligibility for parole for one-and-a-half years, and a conditional release date that had been moved from its rightful place several years into the future. The respondent has been irreparably harmed by the severe postponement of his first parole hearing, as he can never regain the 18 month period it was deferred. Thus, each subsequent hearing will be held a year-and-a-half later than it should have been.

Because of the inexorable pressure applied by the petitioners' interminable penalties and the overt vindictiveness they have displayed against the respondent for having initiated litigation—he has no doubt that if he were ever to enroll in any version of the program conducted by DOC personnel, every effort would be made to gratuitously fill his file with unfavorable reports and assessments—he attempted to reach a compromise with them by offering to participate in a comparable program conducted by an outside agency, as long as he would not be-required to submit an admission of guilt. His offer wasn't made out of any culpability with respect to the purported crime, but out of a genuine willingness to cooperate and to learn. He also offered to take a plethysmographic examination, since it is the primary indicator SATP personnel consider in determining whether an individual has a tendency to reoffend. Not only would an outside program provider with no ties to the DOC be neutral and unbiased with respect to both parties, but the treatment provided would also be of a superior quality, conducted by specialists who are typically far better trained and educated for such a task. Both proposals were categorically rejected by DOC officials, which leads the respondent to believe what he has always suspected—that the prison program's putative goal of treatment or rehabilitation belies its true goal of finalizing convictions and generating additional evidence for civil commitment, even when it does not actually exist.

II. REASONS FOR DENYING THE PETITION

A. The September 13, 1993 Version Of K.A.R. 44-6-124 Is Inherently More Punitive Than The Old Version, Withholding Good Time For Program Refusal Notwithstanding.

Concerning page 7 of their application, the petitioners' portrayal of the May 1, 1984 version of 44-6-124 as a system of "minimum awards" and the supplanting September 13, 1993 version as

a system of "minimum withholding," implying that the new version is more lenient than the old, is false and designed to mislead this Court. As a matter of fact, it was common practice under the old version of the regulation for an inmate who had been found guilty of a class infraction not to lose any good time whatsoever.

Indeed, when the provisions of the old version of 44-6-124 are examined, it becomes readily apparent that an inmate could be found guilty of a class I offense—or any combination of class offenses I through IV during the review period for that matter—and still receive all of the available credits, because loss of good time wasn't mandated for a finding of guilt on a class offense under the old regulation. Subsection (a)(1), for example, simply made it mandatory for inmates with no class I offenses during the review period to be given a minimum of 50% of the credits; in actual practice under the old regulation, the unit team had the discretion to award all of the credits, and often did so, even though an inmate had been found guilty of a class I or II offense. In such instances, if the inmate were willing to plead guilty to the offense and forgo the disciplinary hearing, segregation time and/or monetary fines were often imposed in lieu of good time loss. If the petitioners attempt to deny these facts, the respondent can produce sworn affidavits from disciplinary coordinators and inmates alike to the contrary.

With the advent of the September 13, 1993 version, good time loss became mandatory for disciplinary infractions. A finding of guilt on a class I offense mandates that a minimum of 50% of the available credits be permanently withheld, but in actual practice under the new system, it is not uncommon for all of them to be withheld. A finding of guilt on a class II offense mandates the withholding of 25 to 50% of the credits, and a finding of guilt on a class III offense mandates the loss of 10 to 25% of the credits. But the most radical feature of the new regulation is that, for the first time, program refusal is punishable and results in the loss of 100% of the available credits.

Therefore, bearing the requirements of SATP in mind, it becomes obvious when the two versions of the regulation are compared that Kansas has gone (1) from a system where an inmate could still receive all of the available good time credits if he had been found guilty of a disciplinary offense to one where a finding of guilt mandates the loss of good time; (2) from a system where the unit team was forced to award at least 80% of the credits for an offense-free record to one where, for the same performance, he is mandated to withhold all of them in response to program refusal; (3) from a system where parole eligibility and conditional release could be reached in the normal course of time solely through good behavior to one where both are substantially deferred or rescinded altogether in response to refusal to participate in a voluntary program; (4) from a system where an inmate could exercise constitutionally and statutorily conferred rights without fear of losing his personal property to one where invoking those rights results in permanent property loss without due process; and (5) from a system where an inmate could collaterally attack his conviction and refuse to falsely incriminate himself without fear of reprisals to one where invoking those rights results in the loss of statutorily conferred opportunities for reduced imprisonment.

Another misleading representation appears on page 6 of the petitioners' application. The portrayal of the old version of K.A.R. 44-6-142 thereon as simply serving as a means to tentatively establish an inmate's conditional release date when he enters the prison system and nothing more can be quickly dispelled with K.A.R. 44-6-108(c), which states that "To establish the conditional release date, good time credits not forfeited shall be presumed earned and shall be applied to the maximum sentence term when first computed." In fact, under the good time regulations annexed to the respondent's alleged crime, all credits not "forfeited" were considered "earned" because as previously explained, provisions for "withholding" good time didn't exist: they didn't enter the Article 6 regulations until the new version of 44-6-124 was introduced in 1993.

B. The Provisions Of K.A.R. 44-6-145; 44-6-107(a), (b); And 44-5-105(c)(1) Are Dispositive Of The Petitioners' Application For A Writ of Certiorari.

The respondent respectfully contends that the triumvirate of pivotal regulations listed above are material to the disposition of the application before this Court. Striking a fatal blow to the petitioners' claims, K.A.R. 44-6-145 provides that "[i]ncentive good time credits which were authorized and applied under previous policies and regulations shall continue to be credited to the inmate's sentence and applied to the record," and 44-6-107(a) and (b) ordered the petitioners to compute the respondent's parole eligibility and release dates using the provisions in effect on the date of his alleged crime, even if they had been repealed or revoked. Moreover, the third member of the group, 44-5-105(c)(1), provides that an inmate "shall not be penalized" for choosing not to participate in programs. Even though all three regulations are still in effect, and even though the first two dictate which version of 44-6-124 must be applied in computing the aforementioned dates, all three have met with pretermission at the hands of the petitioners. The respondent contends that this group of regulations renders the petitioners' application gratuitous, a waste of this Court's precious time, and one that should be denied with celerity.

Additionally, it should be noted that unlike other states, Kansas chose to place the substantive provisions governing how good time credits are earned and awarded in administrative regulations rather than in statutes. In fact, contrary to the claim made on page 5 of the petitioners' application, a perusal of K.S.A. 22-3717, 22-3718, and 22-3725 will show that they provide no detail whatsoever of "how such credits are earned, awarded, forfeited, withheld, and accumulated": only the regulations provide such essential information. K.S.A. 22-3717 and 22-3718 make generalized statements about parole eligibility and conditional release, but neither provides any criteria for achieving them. Therefore, when the above-noted facts are taken into consideration, along with the fact that the

regulations at issue are direct extensions of the statutes they implement,[1] no weight should be accorded the claim that the statutes have remained unchanged.

C. Upon Examination, Many Of The Cases Cited By The Petitioners As Being Contrary To The Kansas Supreme Court's Decisions Ironically Offer Support, While Others Are Distinguishable Or Irrelevant.

In their application for certiorari, the petitioners relied heavily on the holdings in *California Dept. of Corrections v. Morales*, 514 U.S. ___, 115 S. Ct. 1597, 131 L.Ed.2d 588 (1995); however, they have distorted the facts of the instant case in an attempt to bring it under the control of *Morales* and have ignored the most critical points made by this Court in that case: (1) the amendment allowing for the decrease in the frequency of subsequent suitability hearings left unchanged the substantive formula for securing any reductions to the sentencing range (115 S. Ct., at 1602); and (2) the amendment had no effect on the standards for fixing a prisoner's "initial" date of parole eligibility (*id.*, at 1502 and 1504). The second point—one which was repeatedly stressed in this Court's opinion—was no doubt crucial to the determination that the level of punishment had not been increased. (The respondent interpreted those statements to mean that if the amendment had adversely affected the provisions for establishing initial parol eligibility or for securing reductions to the sentencing range, the outcome would have been different.) Moreover, this Court held that the amendment only applied to a class of prisoners (those convicted of more than one murder) whose likelihood for release on parole was remote, and simply extended the time between subsequent

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[1] The respondent ironically relies on one of the petitioners' cases—*U.S. v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992)—for the proposition that the regulations at issue are extensions of the above-noted statutes and are subject to scrutiny under the Ex Post Facto Clause. On page 465, the Fourth Circuit Court of Appeals in *Ellen* appositely quoted a Seventh Circuit Court of Appeals' case by stating: " '[W]hen Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative regulation is an extension of the statute for purposes of the Clause.' "

hearings, provided the Board had made specific findings of unsuitability at the initial hearing. *Id.*, at 1603.

The case at bar is not one where changes have been made to parole guidelines; it is not one where the time between subsequent parole hearings has been increased; it is not one where the criteria for determining eligibility for work release have been changed; it is not one where the amendments pertain to the safety, order, or efficiency of the prison system; it is not one where a simple "refinement" has been made to the "definition of good behavior"; it is not one where the punishment for future disciplinary infractions has been slightly increased; and it is not one where the changes have no relationship to the alleged crime for which the respondent is imprisoned. Unlike the circumstances in *Morales*, the radically amended regulations in the instant case have had a profound effect on the standards for fixing the respondent's initial parole eligibility date and his conditional release date. Moreover, the fact that Morales pled "nolo contendere" notwithstanding, the amendment in his case did not conflict with the fundamental right to seek habeas relief as the amendments and the terms of SATP do in the immediate case.

As previously noted, K.A.R. 44-6-107(a), (b) and 44-6-145 ordered the petitioners to use the versions of 44-6-124, 44-6-108, and 44-6-142 in effect on the date of the respondent's alleged crime in computing his eligibility for parole and his conditional release date. Significantly, the sentence introducing the criteria for earning and awarding good time credits in the May 1, 1984 version of 44-6-124 set out above explicitly states that "For parole eligibility, award of good time shall be limited as follows," thus allowing no room for amendments or substitutions. And under the old version of 44-6-124, it was "mandatory" for the unit team counselor to award at least 80% of the available good time credits for each review period an inmate remained free of class offenses. K.A.R. 44-6-108(c) stated that in setting the conditional release date, all good time credits not "forfeited" were considered

"earned" and were to be applied to the maximum sentence term when first computed, and 44-6-142(a) directed that it was to be "presumed" in computing conditional release that 100% of the available credits were "earned" and that they were to be applied on a "projected basis." "Conditional release is mandatory, not discretionary, once the maximum term of imprisonment, less earned good time credits, has been served." *Beck v. Kansas Adult Authority*, 735 P.2d 222, Syl. ¶ 18, 241 Kan. 13 (1987).

With respect to indeterminate sentences before the amendments, the initial parole eligibility date was determined by adding the time served to the good time credits earned on a day-for-day basis, and when the total reached the inmate's minimum sentence, he became parole eligible. And as previously noted, the conditional release date was set from the outset by presuming that all available credits had been earned. Critical to the compution of both is K.A.R. 44-6-125(b), which provides that the only way either date can be adjusted to the inmate's detriment is through the "forfeiture" of credits. However, with the introduction of the radical amendments to 44-6-124 and 44-6-142, prison officials seized absolute discretionary control over all the credits; inmates were no longer automatically awarded good time for avoiding disciplinary infractions; they were no longer presumptively awarded a conditional release date from the outset; and for inmates like the respondent, who are unwilling to give up the statutory and the constitutional right to seek post conviction relief, the new amendments provide for the withdrawal of all statutorily conferred opportunities for reduced imprisonment that were annexed to the alleged crime. The amendments to 44-6-124 have also rendered the punishment prohibition of K.A.R. 44-5-105(c)(1) emasculate, even though the regulation has never been revoked. Moreover, pursuant to subsection (f)(6) of the new version of 44-6-124, prison officials can arbitrarily withhold all of the available good time credits for virtually any whim or reason that comes to mind, not just for program refusal.

Since the supplantation of the old forms of 44-6-124 and 44-6-142 with the radically amended ones resulted in the loss of 1,120 earned good time credits, the postponement of an initial parole hearing for one-and-a-half years, and a conditional release date that was virtually nonexistent, it cannot be said, as it was in *Morales*, that the amendments at issue have left the substantive formula for securing any reductions to the respondent's sentencing range unchanged.

Through the Ex Post Facto Clause, it was intended that legislative acts and amendments give fair warning of their effect. *Dobbert v. Florida*, 432 U.S. 282, 298, 53 L.Ed.2d 344, 97 S. Ct. 2290 (1977). And the federal courts have repeatedly held that provisions for initial parole eligibility are part of the law annexed to the crime for ex post facto purposes. See, e.g., *Warden v. Marrero*, 417 U.S. 653, 663, 94 S. Ct 2532, 2539, 41 L.Ed.2d 383 (1974); *Rodriguez v. United States Parole Com'n*, 594 F.2d 170, 175 (7th Cir. 1979); *Learner v. Gill*, 751 F.2d 450, 454 (1st Cir. 1985). The respondent in the instant case was never given any prior warning that he would be severely punished for his refusal to submit a false admission of guilt and for exercising the constitutionally and statutorily conferred right to seek habeas relief. In fact, his program agreement features the stipulation that he would not be required to participate in SATP. Had he known the petitioners would renege on their stipulation, eradicate all possibility for reduced imprisonment, and confiscate his personal property for his refusal to give up the aforementioned rights, he never would have signed the agreement.

The case at bar is further distinguishable from *Morales* in that the respondent has no prior record, and his alleged victim admitted that she was never threatened or physically harmed in any manner. But even without taking the distinctions between the two cases into consideration, the respondent asseverates that the intimations made by this Court that it would have been a different matter if the amended statute had disadvantageously changed the provisions for securing reductions

to the sentencing range render *Morales* a case that imparts validity and merit to the Kansas Supreme Court's opinion in the immediate case.

Contrary to the petitioners' claims, the instant case is similar in effect to *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 137 L.Ed.2d 63 (1997), where (for certain classes of inmates) a new Florida statute served to retroactively cancel release credits formerly awarded to alleviate prison overcrowding. In both cases, the new provisions allowed prison officials to reach back in time and take away what had already been awarded (in the case at bar, a mandatory conditional release based on the presumption that all credits not forfeited were earned) under the provisions in effect at the time of the offense for which imprisoned.

In regard to the petitioners' recurring argument that the regulations in question merely effectuate the controlling statute's directive that good time credits shall be awarded on an earned basis is fallacious because, as previously noted in the section of regulatory provisions relevant to this case, K.S.A. 22-3725 was never designated as the controlling statute over any of the regulations annexed to the respondent's reputed crime—surprisingly, K.S.A. 75-5210 (providing for inmate programs) and 75-5251 (providing for discipline in correctional institutions) control over all of them! Moreover, the respondent asseverates that he did earn the credits in dispute by satisfying the criteria set out in the old versions of K.A.R. 44-6-124(a)(4) and 44-6-108(c), both of which were "adopted by the secretary of corrections" and in effect for over two years after his sentence was imposed. But in spite of the foregoing points, the petitioners should take note of the fact that in *Lynce*, the Court scolded the parties for placing undue emphasis on the lawmakers' subjective "intent" rather than focusing on the "effect" of the disputed changes. (For the reasons noted above, the respondent submits that the holdings in *Lynce* lend authority and support to the Kansas Appellate Courts' opinions in the Ex Post Facto Cases presently before this Court.)

In *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2175, 111 L.Ed.2d 30 (1990), the prisoner applied for a writ of habeas corpus, contending that the Ex Post Facto Clause was violated by the retroactive application of a new statute allowing for a Texas appellate court to reform his unauthorized sentence (imposing both life imprisonment and a $10,000 fine) without the necessity of remanding for a retrial. This Court held, inter alia, that since the statute in question did not make more burdensome the punishment for a crime after its commission—indeed, as the District Court noted, the punishment was actually decreased by the withdrawal of the fine—its application to the petitioner was not prohibited by the Clause. 110 S. Ct., at 2724. For all the reasons previously noted in this brief, the respondent respectfully contends that unlike the circumstances in *Youngblood*, the punishment has been retrospectively increased in the present case, and that the petitioners' claims to the contrary are preposterous.

Chauvin v. Erickson, 998 F.2d 617 (8th Cir. 1993), was an ill-suited case selection for the propositions posed on pages 14 and 18 of the petitioners' application, as one of its key holdings actually supports their adversary's cause. In similar fashion to the instant case, the statutory provisions in force at the time of the petitioner's crime provided that he receive good time credit against his sentence according to a formula based on the number of days he did not violate any prison disciplinary rule. *Id.*, at 618. A year later, Minnesota added the requirement that prisoners perform work assignments when available to earn good time credit under the formula for that day. *Ibid.* Claiming that the new requirement violated the Ex Post Facto Clause by burdening his opportunity to earn good time under the formula, the prisoner filed a civil rights action.

In dispensing with his claims, the Eighth Circuit Court of Appeals noted that (1) before the work requirement was enacted, prison regulations required prisoners to perform work assignments, and refusing to work or disobeying a direct order to work was a disciplinary infraction; (2) a prisoner

who incurred a disciplinary infraction for refusing to work or disobeying a direct order could not earn good time credit for that day; and (3) since the new statutory work requirement did not change the conditions for earning good time credit, it did not operate to the petitioner's detriment. *Id.*, at 619. In other words, if the new requirement had detrimentally changed the conditions for earning good time credits (as the regulatory amendments have obviously done in the case sub judice), it would have been a violation of the Clause.

Claiming the circumstances to be "essentially identical" to those in the instant case, the petitioners cite *In re Ramirez*, 705 P.2d 897 (Cal. 1985), as an example where the Clause was held not to be violated. Notwithstanding the respondent's sincere belief that *Ramirez* was wrongfully decided—in fact, the case features an outstanding dissenting opinion to that effect—there are substantial distinctions between the two cases.

In its analysis of the case, the California Supreme Court readily conceded that the new sentence reduction credits system disadvantaged the petitioner (*id.*, at 900), but held that since the forfeiture of 48 days' credits was for a disciplinary offense (altering the paperwork relating to a television set) committed while in prison and had no connection to the original crime that resulted in Ramirez's imprisonment, it was not retrospective (*id.*, at 901). The foregoing claim cannot be made in the immediate case, as it is irrefragable that the withholding of years' worth of the respondent's earned good time is intimately related to the alleged crime that imprisoned him.

Fraudently altering a television's paperwork would have also, no doubt, been a punishable infraction under the old California system; the petitioners have readily admitted in their application that program refusal was not punishable [it still isn't according to K.A.R. 44-5-105(c)(1)] prior to the amendments in the case at bar. Nor can it be said that the new system in *Ramirez* would conflict with California's statutory and constitutional provisions for prisoners seeking habeas relief. And

finally, *Ramirez* is obviously not a case where the standards for fixing initial parole eligibility or a mandatory release date were altered to his disadvantage, or one where prison officials reached back in time to withdraw a statutory release date that had already been awarded.

With respect to the dissenting opinion in *Ramirez*, the sagacious justice noted, relying in part on *Weaver v. Graham*, that (1) regarding the issue of retrospectivity, the question should be recast as asking whether the new statute applies to prisoners convicted of acts committed before its effective date (*id.*, at 902); (2) sanctions are one determinant of a petitioner's total prison term, and the term is effectively altered once that determinant has been changed (*id.*, at 903); (3) contrary to the majority's reasoning, the holdings in *Greenfield v. Scafati* definitely apply (*ibid.*); and (4) despite the claims of inconsistent disciplinary rules and immunity from punishment for some prisoners, a uniform disciplinary system can be maintained by prison officials (*ibid.*).

Denying good time credits for refusing to submit a blood sample to prison officials for a DNA information bank, the point of controversy in *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), is obviously a disparate situation from the one in the present case as well, where the credits were withheld in response to a refusal to sacrifice the constitutional right to seek habeas relief with a coerced admission of guilt. And unlike the petitioners in *Ewell*, the respondent freely submitted a blood sample for the same purposes when asked to do so by Kansas prison officials. Although the Fourth Circuit Court of Appeals approved the denial of the credits for the aforementioned reason, it issued other holdings during the course of its analysis that are far more pertinent to the immediate case.

First, the Court significantly held that an inmate does have the right, as of the time of his sentence, to expect the good conduct credits then defined for good behavior. *Id.*, at 486. Second, and more importantly, the Court noted that it unequivocally held a retrospective Virginia statute

denying an inmate who had escaped from custody parole eligibility on his original offense to violate the Ex Post Facto Clause,[2] and then drew the distinction that *unlike the penal nature of provisions governing parole eligibility*, the DNA provision is administrative in nature. *Id.*, at 487. Third, it noted that an inmate's credits are restored if he subsequently decides to submit a blood sample. *Id.*, at 485. Fourth, the Court conceded that changes to good time regulations can violate the Due Process Clause by depriving inmates of liberty interests, but seemed to imply that the prior Virginia good time provisions did not limit official discretion by using language of an "unmistakably mandatory character," i.e., "shall," "will," or "must." *Id.*, at 488. And last of all, the Court stressed that inmates who had lost good time for refusing to submit a blood sample were accorded the full ambit of due process, i.e., the right to a hearing, the right to an advisor, the right to call witnesses, etc. *Ibid.*

Unlike the circumstances in *Ewell*, credits are never restored in the instant case, and no due process attends their taking. Moreover, a review of the regulations before this Court shows, incontrovertibly, that virtually all of them are written in such a manner as to create definite liberty interests in good time, parole eligibility, and conditional release. Furthermore, the petitioners in the current case are attempting to do what the Court of Appeals deprecated in the example case it cited in *Ewell*, i.e., to retrospectively rescind the provisions for parole eligibility and conditional release annexed to the imprisoning offense. For all the reasons stated above, the respondent submits that *Ewell* can be viewed as another case that supports his contentions and the Kansas Supreme Court's opinions.

In *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996), the prisoner simply contested the retroactive application of revised criteria for work release eligibility on due process and ex post facto

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[2] See *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989).

grounds. Because the involved regulations and the work release agreement contained no explicitly mandatory language (unlike the regulations in the present case) and preserved the broad decision making authority of state officials, the First Circuit Court of Appeals found no liberty interest violations and denied relief on the due process claims. *Id.*, at 1161. The petitioner's ex post facto claim met with a similar fate, because the Court found that the regulatory changes affected neither the length of the petitioner's sentence nor his parole options. *Id.*, at 1163. Because the instant regulations abound in explicitly mandatory language, and because their amendments have adversely affected the respondent's parole options, he finds support in the holdings of *Dominique*.

The petitioners also cited a number of cases as acknowledging a "split of authority" over whether prison regulations and parole guidelines are "laws" for ex post facto purposes, and other cases as standing for the proposition that since they are not laws, they are not cognizable under the Clause, including such cases as *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997); *Morales*, supra; and *Youngblood*, supra. Although the respondent could be mistaken, he does not believe the statements made in the foregoing precedents were intended to exclude from ex post facto scrutiny regulations of the type that are the focal point of the immediate case. Moreover, because the highly emphasized "split of authority" pertains to "parole guidelines" and not to substantive regulations that set out standards for determining initial parole eligibility and mandatory release dates, the petitioners' reliance on the cases cited is malapropos.

Using *Francis v. Fox*, 838 F.2d 1147 (11th Cir. 1988), another case involving altered criteria for work release eligibility challenged on due process and ex post facto grounds, to reinforce the aforementioned contention, the Eleventh Circuit Court of Appeals held in part that (1) parole guidelines are not "laws" within the meaning of the Ex Post Facto Clause (*id.*, at 1150); (2) they are stated policy rules showing how agency discretion is likely to be exercised (*ibid.*); and (3) a change

in guidelines *does not affect the point at which a prisoner becomes eligible for parole* or his mandatory release date (*ibid.*). Although the factual circumstances in *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), and *U.S. v. Ellen*, 961 F.2d 462 (4th Cir. 1992) are different, the respective Courts issued holdings of a similar nature—holdings that lead the respondent to the ineluctable conclusion that the regulations in the case sub judice are subject to ex post facto scrutiny.

D. Virtually All Of The Petitioners' Administrative Regulations Create Constitutionally Enforceable Liberty Interests.

In *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974, 41 L.Ed.2d 935 (1984), it was established that in comparison to an ordinary citizen, a prisoner assumes diminished rights, but he is not entirely divested of constitutional protections once he has been convicted of a crime. Prisoners maintain protection under the due process clause and may not be deprived of life, liberty, or property without due process of law. 94 S. Ct., at 2974. In fact, it has recognized that various states have created constitutionally enforceable liberty interests in the prison setting through such means as statutes, administrative regulations, and published prison policy. See, e.g., *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12, 60 L.Ed.2d 668, 99 S. Ct. 2100 (1979) and *Board of Pardons v. Allen*, 482 U.S. 369, 377-78, 96 L.Ed.2d 303, 107 S. Ct. 2415 (1987).

This Court explained in *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 104 L.Ed.2d 506, 109 S. Ct. 1904 (1989), that in determining whether a protectible liberty interest has been created in a prison context, it closely examines the language of the relevant statute or regulation and looks for the presence of the following features, which are critical to its analysis:

> Simply stated, " 'a State creates a protected liberty interest by placing substantive limitations on official discretion.' " *Olim v. Wakinekona*, 461 U.S., at 249, 75 L.Ed.2d, 813, 103 S. Ct. 1741. A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions

> suggest, however, that the most common manner in which a State creates a liberty interest is by establishing
> " 'substantive predicates' " to govern official decision making, *Hewitt v. Helms*, 459 U.S., at 472, 74 L.Ed.2d 675, 103 S. Ct. 864, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met. . . .
>
> We have also articulated a requirement, implicit to our earlier decisions, that the regulations contain " 'explicitly mandatory language,' " i.e., specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest. . . . In sum, the use of " 'explicitly mandatory language,' " in connection with the establishment of " 'specified substantive predicates' " to limit discretion, forces a conclusion that the State has created a liberty interest. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S., at 462 and 463, 104 L.Ed.2d, at 516 and 517.

In the context of awarding good time credits toward parole eligibility, subsection (a)(4) of the old version of K.A.R. 44-6-124 explicitly states that "Inmates with no class I, II, III, or IV offenses during the review period *shall receive* at least 80% of the good time credits allocated for that period." Subsections (a)(5) and (b) plainly state that the unit team has discretion for the remaining 20% *only*, if the foregoing condition has been met. Applying this Court's method of analysis quoted above, it can readily be seen that the regulation features "explicitly mandatory language," i.e., "shall receive," in connection with a "specified substantive predicate," i.e., subsection (a)(4), which plainly sets out the requirement that must be satisfied in order to receive the credits. These straightforward features combine to limit official discretion and, upon a finding that the specific criterion has been met, direct that an outcome be effected—the award of at least 80% of the credits. Moreover, when all of the other administrative regulations set out above are placed under liberty interest scrutiny, it becomes quite clear that the majority, if not all, of them test in the affirmative as well.

E. The Circumstances In *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L.Ed.2d 17 (1981), Were Mild Compared To What The Petitioners Have Imposed In The Instant Case.

Because the facts of this landmark case are so well known, the respondent will dispense with its background information and proceed directly to a comparison of the two cases. In *Weaver*, the original nondiscretionary good time provisions were never entirely revoked as they were in the immediate case; the amounts of gain time automatically awarded were simply reduced. And even though the reductions had no effect on the total number of gain time credits available to an inmate when all means of acquiring them were considered—in fact, the overall amount was increased—this Court held that the new statute substantially altered the consequences attached to a crime committed before its enactment, and therefore changed " 'the quantum of punishment.' " 450 U.S., at 33. (If the quantum of punishment was increased in *Weaver*, when much of the nondiscretionary system was retained in the new law and alternate ways were provided for acquiring even more gain time than had been available before, a fortiori the quantum of punishment has been increased in the instant case, due to the fact that none of the old nondiscretionary awards for avoiding disciplinary infractions were retained in the new version of K.A.R. 44-6-124.) This Court also noted that "[t]he inquiry [to determine whether a prisoner has been disadvantaged] looks only to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." *Ibid.*

Under the mandatory provisions of the old Florida law, Weaver had the opportunity to reduce his 15 year sentence by approximately 73 months; after the new law became effective, his calculated sentence reduction was lowered to approximately 48 months, thus amounting to a 25 month increase in his estimated length of incarceration. *Id.*, at 28, n.6. With respect to the instant case, the provisions mandating the award of good time credits for good behavior in the old version of 44-6-124 were obviated entirely, and were replaced by a system that accorded absolute discretionary control to prison officials over all the credits. Moreover, a review of the new form of the regulation shows that all the credits can be arbitrarily withheld for virtually any reason imaginable [see, e.g., (f)(6)].

Since subsection (a)(4) of the old regulation mandated the award of at least 96 of the 120 available credits to those inmates with no class I, II, III, or IV offenses for each review period that such a record was maintained, the respondent has de facto earned at least 288 credits against his 10-20 year sentence for each year he has remained free of offenses. However, due to the fact that the petitioners have been permanently withholding all of the credits he has earned since April of 1994 with the new provisions, and will continue to do so unless they are permanently stopped, he will lose 84 months' worth of good time compared to Weaver's 25 (almost a five year difference!) and will be relegated to serve most of his maximum sentence of 20 years. Moreover, no previously awarded release date was reneged on in Weaver; his right to apply for a writ of habeas corpus was unencumbered, i.e., had he chosen to do so; and he was never punished with the loss of several hundred dollars' worth of personal property and years' worth of earned good time for refusing to relinquish that right.

The petitioners have posed the specious argument that unlike the present case, the actual number of available good time credits was reduced in *Weaver*, and that the respondent hasn't been disadvantaged by the amendment to 44-6-124 because he has the same amount of potential good time credit available as he had under the old version of the regulation. In *Weaver*, the actual numbers of credits automatically awarded solely for avoiding disciplinary offenses were reduced; in the instant case, they were extirpated! Notwithstanding the petitioners' attempt to obscure the facts of the Florida case, the overall number of good time credits available to Weaver was actually increased under the provisions of the new legislation. In fact, the respondent argued that due to the enactment of attendant provisions, the net effect was increased availability of gain time deductions. *Id.*, at 34. And with an ironic view towards the present case, one of the ways those credits could be "earned" in *Weaver* was through diligent performance in an educational program. *Id.*, at 35. In response to

the respondent's argument, this Court appositely noted in its opinion that none of the new provisions compensated for the reduction of gain time available solely for good conduct. *Ibid.*

Obviously, the petitioners have posed the same argument the respondent posed in *Weaver.*, i.e., no disadvantage has occurred because the amendment hasn't reduced the overall amount of available good time credits. This argument was soundly foreclosed by this Court when it stated, "The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision than he could for the same conduct under the new provision. To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary provisions." *Ibid.* Concluding the opinion, this Court found that the new law "made more onerous the punishment" for Weaver's crime. (For all the reasons noted above, the respondent asseverates that, with the exception of the difference in the degree of increased punishment, the facts in *Weaver* are substantially the same as those in the instant case, thus warranting the denial of the petitioners' application.)

Serving as further support for the respondent's ex post facto claim, a trilogy of cases from the Tenth Circuit—*Spaulding v. Maynard*, 527 F. Supp. 398, 399, Syl. ¶ 1 (D. Okla. 1981); *Ekstrand v. Oklahoma*, 791 P.2d 92, 95 (Okla. Crim. App. 1990); and *Arnold v. Cody*, 951 F.2d 280, 283 (10th Cir. 1991)—has held that a prisoner who is disadvantaged by an amended time reduction credits statute is entitled to have his credits computed under the statute in effect on the date his crime was committed. Moreover, many of the holdings established in *Weaver v. Graham* were recently reaffirmed by this Court in *Lynce v. Mathis*, supra.

F. **Because Their Interminable Punitive Measures For Refusing To Officially Assume Guilt Suppress The State Statutory And Federal Constitutional Rights of Those Who Wish To Challenge Their Convictions, The Petitioners' Application For Certiorari**

Should Be Summarily Denied (U.S. Const. Art. 1, § 9, Cl. 2; K.S.A. 60-1507; 28 U.S.C. § 2254).

1. The Petitioners' Coercive Tactics Are Designed To Override The Fifth Amendment Privilege Against Compelled Self-Incrimination.

Designed to discourage appeals, finalize convictions, and generate additional evidence, SATP is predicated on an official admission of guilt (see exhibit C). Shortly after the respondent filed his application for a writ of habeas corpus in 1996, he invoked the Fifth Amendment privilege, not because he is concealing incriminating evidence, but because of the petitioners' inexorable demands for a relief-quashing confession. Conceding that an admission of guilt, even if it were false, would invalidate any attempt to obtain post conviction relief and possibly result in the filing of changes for perjury, the petitioners nevertheless continued to withhold exorbitant amounts of the respondent's earned good time and indefinitely postponed his initial parole eligibility. Even if he hadn't collaterally challenged his conviction, the respondent would still be unwilling to concoct a false admission of guilt just to assuage the petitioners. Since the privilege against compelled self-incrimination applies to questioning an individual while his appeal from conviction is pending, *Taylor v. Best*, 746 F.2d 220, 222 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985), the respondent assumes that it would apply to pending habeas proceedings as well.

In *State v. Imlay*, 813 P.2d 979 (Mont. 1991), the defendant's suspended sentence for a conviction of sexual assault was revoked because of his refusal to admit to guilt in a sexual therapy program. His participation in the program was ordered by the sentencing court as a condition of his suspended sentence. The Montana Supreme Court reversed the district court's revocation order because the requisite admission of guilt would foreclose Imlay's Fifth Amendment right not to be a

witness against himself, and would bar any effort on his part to challenge his conviction through newly discovered evidence or collateral attack. *Id.*, at 985.

Acknowledging that the aforementioned avenues of redress are important rights guaranteed to every defendant under the American system of criminal justice, the court reasoned that they would be rendered meaningless under the conditions the state was attempting to impose, i.e., a compelled admission of guilt as a condition of continued freedom. *Ibid.* The court further reasoned that the reliability of an admission of guilt under such circumstances would be highly suspect. *Ibid.* Moreover, the court recognized that since Imlay testified at his trial that he was innocent, a forced admission of guilt would result in the dereliction of his Fifth Amendment right not only as to the crime for which he had been convicted, but also to the crime of perjury. *Ibid.* The court concluded its opinion by stating its belief that the better reasoned decisions are those that protect the defendant's constitutional right against self-incrimination and that prohibit augmenting a sentence for refusing to confess. *Ibid*

Regarding the matter of augmenting punishment because a defendant refuses to admit guilt, most federal courts of appeals that have addressed the issue have followed the Fifth Circuit Court of Appeals' rationale in *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), which was also relied on by the Montana Supreme Court in *State v. Imlay*, supra. The sentencing court in *Thomas* told the accused, who had been convicted of bank robbery, that if he would "come clean," it would be taken into account in the length of sentence to be imposed, but that if he persisted in denying culpability—Thomas' two accomplices had pled guilty to the crime—the Court would take that into account as well. When the defendant remained adamant in proclaiming his innocence, he was sentenced to the maximum term permitted by law. Concluding that the alternatives presented to the accused violated his Fifth Amendment right not to be a witness against himself, the Court of Appeals

vacated the sentence imposed by the trial court. *Id.*, at 946-47. Notwithstanding the fact that the defendant had already been convicted, the Court based its decision on the following ratiocination:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for a new trial (including opportunity to discover new evidence), appeal, petition for certiorari, and *collateral attack*. [Emphasis added.] Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.
>
> The two "ifs" which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first "if," he would elect to forego all of the above-noted post conviction remedies and confess to the crime of perjury. . . . Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second "if" was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. From the record, it is clear that an ultimatum of the type which we cannot ignore or approve confronted Thomas. . . . *Id.*, at 945.

With respect to the instant case, the respondent's contention that the punishment for his reputed crime has been augmented is supported by this Court in *Weaver v. Graham*, 450 U.S., at 32, wherein it was held that the method of awarding time reduction credits is, in fact, one determinant of an individual's prison term, and that his effective sentence is altered once this determinant has been changed.

The petitioners in the instant case have even promised the infliction of punishment years from now should the respondent prevail. Shortly after this case had been filed in the Kansas Supreme Court, he was informed that if he continues to resist, his conditional release (held to be "mandatory" in *Beck*, supra) will be made contingent on an admission of guilt and the completion of SATP, and that if he hasn't acquiesced by the time his conditional release date arrives in 2001, they will release him just long enough to sign his parole revocation papers for failure to comply with the aforementioned conditions. The Fifth Amendment protects a prisoner's refusal to admit to a crime where he is threatened with the loss of benefits, including the withholding of parole. . . . *McMorrow*

v. Little, 109 F.3d 432 (1997). And in *Minnesota v. Murphy*, 465 U.S. 420, 444, 104 S. Ct. 1136, 79 L.Ed.2d 409 (1984), this statement was made in the dissenting opinion: "First, many—probably most—of the persons threatened with sanctions if they refuse to answer official questions lack sufficient knowledge of this Court's decisions to be aware that the State's threat is idle." However, thus far the petitioners' threats in the case at bar have been anything but idle!

Possessed by all citizens of the United States, no matter who they are or how they are situated, the Fifth Amendment privilege against self-incrimination extends beyond trial or custodial situations, because "the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Estelle v. Smith*, 451 U.S. 454, 462, 101 S. Ct. 1866, 1873, 68 L.Ed.2d 359 (1981). Therefore, the privilege extends to those already convicted of a crime. *Minnesota v. Murphy*, 465 U.S., at 426, 104 S. Ct., at 1141-42, citing *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976). "The general rule that the privilege must be claimed when self-incrimination is threatened has also been deemed inapplicable in cases where the assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony.' " *Murphy*, 465 U.S. at 434, 104 S. Ct. at 1145-46, citing *Garner v. United States*, 424 U.S. 648, 661, 96 S. Ct. 1178, 47 L.Ed.2d 370 (1976). Access to the privilege is foreclosed when an individual is penalized for invoking it, and has been termed as the "classic penalty situation" by this Court. Under such conditions, the privilege is said to be "self-executing." *Murphy*, 465 U.S. at 435, 104 S. Ct. at 1146.

Since juries are by no means infallible, innocent individuals are sometimes convicted of crime. As noted above, the respondent didn't invoke the privilege because he is concealing incriminating evidence, he invoked it in response to the petitioners' unremitting attempts to force him to lie about this innocence. If he were truly guilty of rape, he never would have left his condom behind as

evidence for the authorities. Severely punished and irreparably harmed for exercising constitutional rights, the respondent prays that this Court will deny the petitioners' application for a writ of certiorari.

2. Denying Parole Eligibility And Conditional Release To Only Certain Individuals Who Have Been Convicted of An Alleged Sex-Related Offense Because They Refuse To Abdicate The Statutory And Constitutional Right To Seek Habeas Relief, While All Other Offenders Are Free To Challenge Their Convictions Unfettered, Violates The Precepts Of Due Process And Equal Protection Of The Law.

The Suspension Clause of the Constitution, Art. 1, § 9, cl 2, states: "The privilege of the Writ of Habeas Corpus shall not be suspended. . . ." In solemn defense of the Great Writ, this Court has stated that "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26, 83 L.Ed. 455, 461, 59 S. Ct. 442 (1939). And in *Johnson v. Avery*, 393 U.S. 483, 486, 21 L.Ed.2d 718, 722, 89 S. Ct. 747 (1969), this Court made it clear that in instances where state regulations applicable to inmates conflict with federal constitutional or statutory rights, the regulations may be invalidated. Moreover, this Court held in *Ex parte Hull*, 312 U.S. 546, 549, 85 L.Ed. 1034, 1036, 61 S. Ct. 640 (1941) that a state's agents cannot abridge or impair a petitioner's right to apply for a writ of habeas corpus.

Notwithstanding the fact that habeas corpus ad subjiciendum was an integral part of this nation's common law heritage and has been a fundamental clause of the Constitution ever since it was signed by our founding fathers in 1787, *Preiser v. Rodriguez*, 411 U.S. 475, 484-85, 93 S. Ct. 1827, 36 L.Ed.2d 439 (1973), the petitioners are, in effect, brazenly attempting to punish the respondent to the point where he abdicates not only the privilege against self-incrimination, but also the privilege

of applying for the Writ. As previously noted, the petitioners were informed well before the respondent filed his application pursuant to K.S.A. 60-1507 that he would be collaterally attacking his conviction; however, they responded with additional reprisals for his invocation of the aforementioned rights.

"[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' " *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 54 L.Ed.2d 604, 98 S. Ct. 663 (1978), quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, no. 20, 36 L.Ed.2d 714, 93 S. Ct. 1977 (1973). "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372, 73 L.Ed.2d 74, 80, 102 S. Ct. 2485 (1982). Due process of law is violated when the government vindictively attempts to penalize a person for exercising a protected statutory or constitutional right. *United States v. Conkins*, 987 F.2d 564, 565, Syl. ¶ 6 (9th Cir. 1993). The respondent asseverates that the petitioners' acts are in direct violation of the above-cited case law and are patently designed to preclude him from petitioning the courts for redress.

Through their reprisals the petitioners have established the discriminatory precedent that only certain individuals who have been convicted of an alleged sex-related offense will be punished for pleading "not guilty" at trial, for maintaining their innocence, and for seeking post conviction relief. The respondent submits that if such bias is countenanced by the courts, K.S.A. 60-1507 should be amended to provide a caveat to such individuals, notifying them of the consequences for invoking the statute. An equal protection violation occurs when the government treats someone differently than another who is similarly situated. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105

S. Ct. 3249, 87 L.Ed.2d 313 (1985); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111, Syl. ¶ 7 (10th Cir. 1991).

The respondent respectfully contends that punishing certain individuals so severely and in such a protracted manner for refusing to give up the aforementioned fundamental rights with an official admission of guilt while all other offenders, no matter how serious the crime, are free to challenge their convictions and are accorded the full ambit of provisions for reduced imprisonment without any adverse consequences is highly discriminatory and a patent due process and equal protection violation. Moreover, the petitioners are fully aware of the fact that their tactics act as a strong deterrent to invoking the statutory and constitutional process that is supposed to be made equally available to everyone, and can result in overwhelming an innocent individual to the point where he abandons the only means available for attempting to establish his innocence.

III. CONCLUSION

The petitioners have attempted to prepossess this Court's decision by posing the trite conditional that if their application for certiorari is denied, it will result in a flood of violent criminals being released on the streets of Kansas. But the truth of the matter is that many of the inmates in this state are not a threat to the public, are not predisposed to commit violent crimes, and would assume the role of a law abiding citizen if released. Albeit heinous crimes have been committed from time-to-time by rare individuals, but it is highly unfair to greatly enhance an inmate's punishment and attempt to deprive him of statutory and constitutional rights in response to the egregious acts committed by another.

Ideally, the petitioners would have this Court reverse the Kansas Supreme Court's decisions, overrule *Weaver v. Graham*, and accord them plenary power to adversely change the terms of an

inmate's sentence at will—the exact situation our founding fathers strove to prevent when they penned the Ex Post Facto Clauses of the Constitution. If *Weaver* were ever overruled, one of the few remaining impediments would be lifted that prevent prison officials from becoming unjust and tyrannical. For all the reasons stated in this brief, the respondent beseeches this Highest of all Courts to deny the petitioners' application for a writ of certiorari.

Respectfully submitted,

Raymond F. Stansbury

Raymond F. Stansbury

Exhibit A

SEXUAL ABUSE TREATMENT PROGRAM

SATP
DCCCA, Inc.
c/o Lansing Correctional Facility
P.O. Box 2
Lansing, Kansas 66043

Telephone (913) 727-3235 ext. 7257
Fax (913) 727-2675

April 18, 1995

David A. Reed
Attorney at Law
5121 Parallel Parkway
Suite 3
Kansas City, Kansas 66104

RE: Patrick Shaw

Dear Mr. Reed:

This is in response to your letter of February 24, 1995 regarding concerns of SATP participation as a voluntary program. Participation in SATP is voluntary and certain criteria must be met for acceptance. SATP imposes no consequences for refusals.

Sincerely,

Barbara Owens, LSCSW
SATP Coordinator

BO:lh

BEST AVAILA

Exhibit B

IN THE DISTRICT COURT OF LEAVENWORTH COUNTY, KANSAS

Jerry R.C. Cooper, Plaintiff	)	
v.	)	Case No. 9303CV00111
DECCA, Inc., et al., Defendants	)	

DEFENDANT MCKUNE'S ANSWERS TO PLAINTIFF'S 1st SET OF INTERROGATORIES

COMES NOW the defendant, David McKune, and answers the plaintiff's 1st Set of Interrogatories as follows:

1. Lansing Correctional Facility
P.O. Box 2
Lansing, KS 66043

Hutchinson Correctional Facility
P.O. Box 1568
Hutchinson, KS 67504

2a. Approximate current number of participants is 1 for every 9 month period.

b. Participation is voluntary, not required by t Kansas Department of Corrections.

c. Between September 1, 1989 and April 1, 1993, men successfully completed the SOTP through either program provided by Weldy and Weldy or DCCCA.

BLE COPY

Exhibit C

S.A.T.P.

ADMISSION OF GUILT

This is to confirm that I understand the criteria for being accepted into the S.A.T.P. (Sexual Abuse Treatment Program) at Lansing Correctional Facility, which includes an admission of Guilt for my sex crime.

I realize that I am being allowed to participate in an evaluation for acceptance into S.A.T.P. with the understanding that I followed through with an Admission of Guilt.

This document will serve as my official Admission of Guilt to the following:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____ _____

Signature Date

_____ _____

Witness Date

No. 98-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT D. HANNIGAN, WARDEN, ET AL., PETITIONERS

v.

RAYMOND F. STANSBURY, RESPONDENT

PROOF OF SERVICE

Pursuant to Supreme Court Rule 29, I, Raymond F. Stansbury, hereby declare that I served a true and correct copy of the enclosed Motion For Leave to Proceed *In Forma Pauperis* and Brief In Opposition to the Petition For Writ of Certiorari on each party to the above-captioned case by depositing them in the United States Mail, first class postage prepaid, on this 9th day of November, addressed to the following individuals:

Mr. Michael K. Lehr
940 North Main
Wichita, KS 67203
Atty. for Michael Bankes
(316) 264-8181

Mr. Stephen R. McAllister
Asst. Attorney General
301 S.W. 10th Ave.
Topeka, KS 66612-1597
Counsel of Record
(785) 296-2215

RECEIVED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of November, 1998.

Raymond F. Stansbury